IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 950 of 1993

For Approval and Signature:

Hon'ble MISS JUSTICE R.M.DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

RAMBADAN R SHUKLA & 1

Versus

DSP & 1

Appearance:

MR AJ SHASTRI for Petitioner

MR DA BAMBHANIA for Respondent No. 1

CORAM : MISS JUSTICE R.M.DOSHIT

Date of decision: 08/11/96

ORAL JUDGEMENT

Both the petitioners were armed constables who are convicted by the learned Sessions Judge, Mehsana by his judgment and order dated 14th March, 1991 for the offence committed under sections 302, 307 and 114 of the Indian Penal Code. Both the petitioners have been sentenced,inter-alia, to suffer Rigorous Imprisonment for five years. Feeling aggrieved by their conviction, the

petitioners have preferred Criminal Appeal No. 157 of 1991 before this Court. Said appeal is admitted by this Court and the petitioners have been released on bail.

2. While the petitioners were serving as armed police constables on 27th June, 1989, they opened firing which resulted into death of member of public.It is for commission of this offence, the petitioners have been convicted as aforesaid. Pursuant to the said conviction, the petitioners have been dismissed from service under orders dated 6th February, 1993, made by the District Superintendent of Police, Mehsana.

3. The petitioners have preferred this petition against the above referred orders of dismissal from service made on 6th February, 1993. Learned advocate Mr. Shastri has appeared for the petitioners and has contended that;

in view of the appeal, against conviction of the petitioners having been admitted by this Court and the petitioners having been released on bail, order of conviction cannot be said to have attained finality and, therefore, no order of dismissal could have been made against the petitioners. The question that arises for the Court's consideration is whether pending appeal against conviction, disciplinary action can be taken against the convicted government servant or not. The matter is no more res integra. The Full Bench of this Court was posed with the very issue in the matter of PD Waghela & Ors. vs. GC Raiger,Dy.IGP & Ors. [1994(1) GLR 240]. The Court considering the rival contentions has, in paragraph 2l of the judgment, held thus;

> "The conviction spoken to in clause (a) of the second proviso to clause (2) of Art.311, to form a basis for the dismissal, removal or reduction in rank, could be one recorded by a competent Criminal Court in the first instance and the preferring of an appeal or revision against such conviction and the pendency of the same will not alter the position and action, taken on the basis of such conviction, need not conform to clause (2) of Art.311, since by the express terms of the second proviso thereto, clause (2) of Art.311 is dispensed with."

Hence, in view of the above judgment, this contention raised by Mr. Shastri is rejected.

(b) Mr. Shastri has further contented that before making any order of punishment pursuant to the conviction by the Criminal Court, the Government servant concerned is required to be afforded an opportunity to show cause against the proposed punishment. While considering the larger issue, the Full Bench in case of PD Vaghela {supra}, made it clear that it was not expressing any view on effect of rules, circulars and instructions providing for different contingencies and speaking in different language. He has submitted that in view of the provisions contained in the Gujarat Civil Services [Discipline & Appeal] Rules,1971, [hereinafter referred to as "the Rules"] the petitioners were required to be given an opportunity to show cause against the proposed punishment. In the present case, the respondents have failed to comply with the aforesaid formality and,therefore, the impugned dismissal is vitiated. In support of his contention, he has relied upon the judgment of the Division Bench of this Court in the matter of State of Gujarat and Others Versus Sudama Sinh Lotan Sinh [1994 (2) GLR 1201]. In that case the Division Bench, considering the provisions made in rule l4 and l0 of the Rules,held that pursuant to the provisions contained in rule 10(4)(b) of the Rules, the Government servant was required to be afforded an opportunity to show cause against the proposed penalty. The Court further held that in the case before the Court, said formality had not been complied with and the order of dismissal was, therefore, vitiated.

In that matter, the Court had considered the provisions of rule l4 and l0 of the Rules as they stood prior to the year 1986. Since 16th April, 1986, rule 10(4) has undergone substantial change. Said rule has been substituted by rule 10(4) under the Notification dated 16th April, 1986. In the present case, the petitioners were convicted in the year 1991 and have been dismissed from service in the year 1993. The Court is therefore, required to consider the effect of the rules since their amendment on 16th April, 1986. Prior to 16th April, 1986, rule 10(4) (i)(b) read as under:

(b) give to the Government servant a notice stating the penalties proposed to be imposed on him and calling upon him to submit within fifteen days of receipt of the notice or such further time not exceeding fifteen days,

as may be allowed, such representation as he may wish to make on the proposed penalty on the basis of the evidence adduced during the inquiry held under rule 9.

Whole of rule 10(4) has been substituted by new rule 10(4) since l6th April 1986 which reads as under :

> "(4) If the disciplinary authority having regard to its findings on all or any of the articles of charge and on the basis of the evidence adduced during the inquiry is of the opinion that any of the penalties specified in items (4) to (8) of rule 6, should be imposed on the Government servant, it shall make an order imposing such penalty and it shall not be necessary to give the Government servant any opportunity of making representation on the penalty proposed to be imposed. "

Thus, the Government has made express provisions that the Disciplinary Authority shall make an order imposing penalty and it shall not be necessary to give Government servant any opportunity of making representation on the penalty proposed to be imposed.The Rules are legislative in nature. Aforesaid rule is mandatory and the Disciplinary Authority is required to make necessary orders imposing penalty on receipt of the inquiry report without further notice to the delinquent. The Hon'ble Supreme Court in the matter of Union of India vs. Tulsiram Patel [AIR 1985 SC 1416] had an occasion to consider the impact of the amendment in Article 311(2) of the Constitution of India. While considering the effect of 42nd Amendment of the Constitution, Court rejected the contention that irrespective of the provisions contained in Article 311(2) of the Constitution, delinquent was required to be afforded an opportunity to show cause against proposed penalty. In paragraph 70, the Court held thus;

> " The position which emerges from the above discussion is that the keywords of the second proviso govern each and every clause of that proviso and leave no scope for any kind of opportunity to be given to a government servant. The phrase "this clause shall not apply" is mandatory and not directory. It is in the nature of a Constitutional prohibitory injunction restraining the disciplinary authority from holding an

> inquiry under Article 3ll(2) or from giving any kind of opportunity to the concerned government servant. There is, thus, no scope for introducing into the second proviso some kind of inquiry or opportunity by a process of inference or implication."

Hence, in view of the aforesaid judgment of the Supreme Court, it is required tobe held that the provisions of affording an opportunity to the delinquent before making order of punishment provided in former rule 10(4)(l) (b) which has been expressly deleted under substituted rule 10(4) cannot be reintroduced by implication or inference. Therefore, in view of the express provisions contained under rule 10(4), the petitioners had no right to an opportunity of making representation on the penalty proposed to be imposed. I am, therefore, of the opinion that the respondents were not required to afford any opportunity to the petitioners to show cause against the penalty proposed tobe imposed and the orders made against the petitioners cannot be held tobe bad or illegal in any manner. In view of the above discussion, this contention raised by Mr. Shastri is rejected.

No other contention has been raised by Mr. Shastri. The petition is dismissed. Rule is discharged. Ad-interim relief granted earlier stands vacated. There shall be no order as to costs.

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